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No. 08-971

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROBERT SIMPSON RICCI, ET AL.,

Petitioners,

v.

DEVAL L. PATRICK, IN HIS CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Dated: February 18, 2009

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the Wrentham Association for Retarded Citizens, Inc. states that it is a non-profit corporation exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code and is not a publicly held corporation that issues stock. It has no parent corporation.

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STATEMENT OF THE CASE

More than 35 years ago, thousands of mentally retarded residents of state facilities in the Commonwealth of Massachusetts filed the first of several federal class actions to remedy deplorable conditions in those institutions. The various cases were consolidated into a single action before the District of Massachusetts (Tauro, J.). After hearing extensive evidence and taking multiple, day-long views of the facilities himself, and requiring state and federal officials to appear and respond to his inquiries, the district court ultimately found that the Commonwealth had violated its obligations to provide constitutional and statutory minimal levels of care. (App. 9-10.) The Commonwealth did not dispute these findings; it consented to the entry of interim decrees by the district court that mandated comprehensive measures to remedy the statutory and constitutional violations. (App. 10.) For more than fifteen years, from 1977 through 1993, the district court actively oversaw and administered those decrees, "conscientiously and with great care." (App. 3.)

On May 25, 1993, the district court endorsed a final consent decree and entered an order, the Disengagement Order, that closed the court's direct oversight of the institutions. The Disengagement Order detailed the Commonwealth's obligations to the current and former residents of the state facilities, and it provided that the case could be reopened in the event of a systemic failure by the Commonwealth to fulfill its obligations under the Order.

In 2004, the Commonwealth decided to remove residents from its institutional facilities. Many of these mentally retarded individuals had lived in these settings for decades, and for some, these institutions were the only homes they had ever known. The Commonwealth's decision to remove residents was driven largely by budgetary considerations; in many cases decisions were made without regard for or contrary to the wishes of the residents themselves and their guardians. In response to multiple petitions, the district court – the same judge who had presided over the case since its inception in 1972 – appointed the United States Attorney for the District of Massachusetts as Court Monitor to investigate the Commonwealth's compliance with the Disengagement Order. After a year-long investigation, the Monitor provided an extensive report. The district court ultimately made factual findings that the Commonwealth had indeed failed, systemically, to comply with the Disengagement Order. Specifically, the Commonwealth made the decision to transfer residents without considering the wishes of the guardians and residents or properly considering whether the new residence could actually provide "equal or better services." This failure was not merely procedural: drawing on the Monitor's investigation and its decades of familiarity with the vulnerable plaintiffs, the court found that such transfers could have "devastating effects" upon their well-being. To remedy this systemic violation, the district court entered a careful and judicious order that required the Commonwealth only to consider, meaningfully, the residents' wishes to remain in the settings where they had lived for decades.

On appeal, the First Circuit showed no deference to the judge, despite his unmatched expertise. Characterizing the case as an abstract question of contract interpretation, the appeals court applied a de novo standard of review and ignored the factual findings on which the district court had based its order. In so doing, the First Circuit exacerbated a split between the circuits on the appropriate standard of review to be applied when a district court applies a consent decree that it had entered and has overseen. The appeals court did not acknowledge this split, which has divided the circuits for years.

This widely publicized case presents this Court with an excellent opportunity to resolve the long-standing split between the circuits on the proper roles of federal courts in administering systemic relief. This issue arises in a broad range of cases: this one involves the rights of the mentally retarded, but it is equally important in other institutional reform cases involving employees, students, and housing recipients who have faced discrimination, prisoners who are incarcerated under cruel and unusual conditions, and businesses and governments that have violated anti-trust and environmental laws. This case, in particular, exemplifies why an appeals court should show some deference to a lower court that has crafted a remedial decree based upon its extensive firsthand familiarity with complex institutional problems.

Consequently, The Wrentham Association for Retarded Citizens, Inc. ("Wrentham Association"), a plaintiff below, now submits this Response to the *Petition for a Writ of Certiorari* filed on January 29, 2009 (the "Petition") to urge this Court to grant the

Petition, issue a writ of certiorari, and reverse the decision of the First Circuit.[1]

I. History Of The Case

A. The District Court Has Overseen DMR Operations For Decades.

This case is the latest chapter in a saga that began in 1972, when a class of mentally retarded residents of the Belchertown State School petitioned the District of Massachusetts to remedy conditions that were unconstitutional and unconscionable. After residents of other state facilities filed parallel actions, all of the cases were consolidated before Judge Joseph Tauro.

After hearing extensive evidence and taking day-long views of the facilities himself, the district court ultimately found that the Commonwealth of Massachusetts had violated its obligations to provide constitutional and statutory minimal levels of care. The Commonwealth did not dispute these findings; it consented to the entry of interim decrees by the district court that mandated comprehensive measures to remedy the statutory and constitutional violations.

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[1] The Wrentham Association was listed as a petitioner in the Petition, but is filing this Response because it is separately represented in this matter and is the class representative for a different group of individuals than the Paul A. Dever Association for Retarded Citizens, Inc., Fernald Development Center Class members, Belchertown Plaintiffs and Monson Plaintiffs who are also listed in the initial Petition.

The constitutional and statutory violations at the Commonwealth's institutions were pervasive, deep, and complex, not remediable simply by issuing a single order. Accordingly, for more than fifteen years, from 1977 through 1993, the district court actively oversaw and administered various decrees, "conscientiously and with great care." (App. 3.) The court invested thousands of hours, often guided by experts, to learn the workings of the Commonwealth's Department of Mental Retardation ("DMR"), understand the proper standards of care for the mentally retarded residents, and carefully develop a practical, effective, and constitutionally appropriate remedy that could deliver measurable improvements. (App. 48-49.)

Always mindful of the limited role of a federal court in such an endeavor, the district court structured and administered its remedy with the aim of ending its oversight at the first appropriate opportunity. On October 9, 1986, the court entered an order that set out a list of specific tasks for the Commonwealth to accomplish and represented a "step of disengagement" for the court. *Ricci v. Okin,* 978 F.2d 764, 764 (1st Cir. 1992). To facilitate this disengagement, the 1986 Order established the Office of Quality Assurance ("OQA") to oversee the Commonwealth's treatment of the retarded and to "safeguard the health, safety and well-being of Class Members . . ." *Ricci v. Okin,* 646 F. Supp. 378, 381 (D. Mass. 1986). The 1986 Order contemplated the court's final disengagement after three years. *Id.* at 381. The parties themselves agreed several times to extend the Order. *Ricci v. Okin,* 978 F.2d at 764-65.

Finally, more than twenty years after the first suit was filed, the Commonwealth rectified the

deficiencies sufficiently that the district court could take a less active role:

> For the past two decades, literally thousands of hours have been devoted to fashioning a comprehensive remedial program that has included multi-million dollar capital improvements, establishment of a responsible program of community placement, as well as significant staffing increases geared to meeting the individual service plans and overall needs of those with mental retardation.

(App. 50.) On May 25, 1993, the district court endorsed a final consent decree and entered an order, the Disengagement Order, that closed the case. (App. 9-10.)

The Disengagement Order detailed the Commonwealth's obligations to the residents of the state facilities. In particular, the Disengagement Order required the Commonwealth to develop and implement an individual service plan ("ISP") for each resident. An ISP sets out in detail the resident's "capabilities and needs for services" such as medical or psychological care. (App. 54); *see generally* 104 Mass. Code Regs. 29.06(2). ISPs are to be drafted after individual meetings between evaluating professionals and clients and their guardians. *See* 104 Mass. Code Regs. 29.06(2)(b). The Disengagement Order required DMR to comply with state regulations governing ISP planning, which are intended to provide an individual and personalized analysis of a resident's needs and to provide residents and their guardians with a voice in

the process. (App. 55, n.2); *see also* 104 Mass. Code Regs. 29.06(2)(a)(2).

The Disengagement Order also prohibited the Commonwealth from transferring a class member "out of a state school into the community, or from one community residence to another such residence, until and unless the Superintendent of the transferring school (or the Regional Director of the pertinent community region) certifies that the individual to be transferred will receive equal or better services to meet their needs in the new location, and that all ISP-recommended services for the individual's current needs, as identified in the ISP, are available at the new location." (App. 57-58.)

To protect the rights of the class members, the Disengagement Order expressly provided that the district court could reassert jurisdiction in the event that the Commonwealth "substantially fail[ed] to provide a state ISP process in compliance with [the] Order," engaged in "a systemic failure to provide services to class members as described in [the] Order," or engaged in "a systemic failure to provide ISP services required by [the] Order." (App. 59-60.)

B. After A Thorough Investigation By The U.S. Attorney, The District Court Made Factual Findings That There Were Systemic Failures To Comply With The Disengagement Order.

Beginning in 2004, the Commonwealth enacted three budget measures that fundamentally changed its approach to caring for mentally retarded

individuals. (App. 6.) Pursuant to those measures, the Commonwealth announced its new policy of closing the state facilities and transferring the residents, primarily to privately run community residences, largely for cost reasons. (App. 7.)

On July 14, 2004 the Fernald Petitioners moved to reopen the case because the Commonwealth had failed systemically to provide services in compliance with the Disengagement Order. The Wrentham Association filed a similar motion on February 7, 2006. Those motions were denied without prejudice on January 20, 2005 and June 7, 2006, respectively. Those rulings were not appealed and were not before the First Circuit. Instead, the district court, sua sponte, appointed the United States Attorney for the District of Massachusetts as an independent monitor to investigate 49 transfers from the Fernald Development Center. (App. 14.)

After a year-long investigation, during which the Monitor "visited DMR Intermediate care facilities and community residences throughout the Commonwealth, surveyed day programs, hired independent medical experts, scoured the medical and departmental records of the transferred individuals, and met with officials, guardians and residents," the Monitor filed an extensive report outlining his findings. (App. 38.) After considering the parties' written comments on the Monitor's report, the district court made factual findings that the Commonwealth engaged in systemic violations of the Disengagement Order by failing to provide a meaningful ISP process that allowed guardians and residents to state their wishes, and by deciding to transfer everyone before meaningfully considering

whether new residences could actually provide "equal or better services."

> An essential function of the ISP process is to give residents and guardians a voice in important decisions. It is intended to provide an individual and personalized analysis of each resident. Administering this process under the global declaration that Fernald will be closed, however, eviscerates this opportunity for fully informed individualized oversight. To dismiss the benefit of hearing the voices and wishes of those most directly impacted invites the devastating effects about which the Monitor has warned. The DMR declaration not only disenfranchises the participants in the ISP process, it also deprives the DMR itself of valuable information, thereby undermining the efficacy of the ISP process. As a consequence, such administration of the ISP process amounts to a "systemic failure" to provide a compliant ISP process, within the meaning of the Final Order.

(App. 40 (footnotes omitted).) Consequently, the district court reasserted jurisdiction.

Importantly, the district court's decision was not based upon a construction of disputed terms in the Disengagement Order. It rested, rather, on factual findings that there were systemic violations, which findings were based, explicitly, on "the entire record of this case, the Court Monitor's thorough

investigation, as well as more than three decades of personal oversight of the case and the dozens of 'views' by this court of the subject facilities." (App. 38-39.)

The evidence of record included evidence that even supposedly "voluntary" transfers were the result of misleading and ominous threats to families and guardians that their loved ones had to move, and move quickly, lest they be left with the worst possible housing options. According to the Monitor's report, many of the guardians had in fact "decided to transfer their Wards from Fernald based on the announcement that Fernald will be closing. So they were prompted to consider other locations because of the concern that Fernald would be closed and they wanted to ensure that the best possible option would be available to them and to the residents." *3/7/07 Transcript*, RA6:1734.[2]

For instance, Mark Booher, Ph.D., a licensed psychologist with personal and professional experience working with mentally retarded adults, submitted an affidavit describing "scare tactics" and forms of manipulation that were employed by DMR to pressure guardians and families to "voluntarily" move their loved ones. *Booher Aff.*, ¶¶ 3-4, RA1:260.

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[2] The parents of at least one of the transferred residents expressed doubt about their decision to transfer their daughter after she passed away, shortly after the transfer. *Monitor's Report*, RA6:1715. ("RA" refers to the record appendix in the First Circuit.) Notably, their decision to transfer their daughter was driven by the belief – instilled by the DMR – that Fernald's closure would result in the best alternative residences quickly filling up, leaving them with only unacceptable options. *Id.* Their daughter lived at Fernald for 40 years and died within a year of her transfer. *Id.*

Dr. Booher noted that "DMR staff have used, and abused, their positions and power to convince, or force family members to agree to circumvent the ISP process." *Booher Aff.*, ¶ 5, RA1:261. Dr. Booher elaborated:

> DMR administration has been trying to circumvent the ISP process by assigning staff to the sole task of talking "informally" with families about placements and completing a "Placement Profile Form" for each resident. . . . Families have reported that [Joe Foley] has used scare tactics: He told them that they had to act quickly because Fernald would close in a few months; he explained that by acting now, they could get a good placement; and he warned them that the most caring decision they could make was to move their family member now so they would not have to endure declining services as Fernald was closing. Many of the family members he deals with are over 70 years of age and had relied on him for years for advice to help their relatives. ... family members have been afraid of personally filing a complaint ... because they feared personal retribution. Joe Foley and DMR might challenge their guardianship, as has been done to family members in the past when they did not agree to what DMR wanted to do. They were also afraid of retribution through their vulnerable Fernald family members.

> Regrettably, Joe Foley is not the only Fernald staff person using such scare tactics to persuade guardians about transfer....

Booher Aff., ¶ 5, RA1:261-62.

Even while the US Attorney was investigating the transfers in 2006 and 2007, the pressure continued. The Fernald Plaintiffs presented a sample of the type of letter that had been sent to guardians for at least 6 months, which stated in part: "As you know, Fernald . . . is closing and remaining at the facility will no longer be an option for the named person." *3/7/07 Transcript*, RA6:1747-48. The district court understood the effect of such a letter:

> You are talking to people who are so afraid that whatever little thing they have got left going for them, it will be taken away. They won't argue with anybody no matter what they say to them. . . . You are dealing with people who are frightened.
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> . . .
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> [Y]ou know that the pressure has been there, that there have been . . . I can't tell you how many letters I've had, how many times we've had meetings like this where people have reported to me that notwithstanding the prohibition, there have been these suggestions made, intimidations made, attempts at intimidation made to let somebody know you better move fast because the ship is sailing.

3/7/07 Transcript, RA6:1758-59. Drawing upon this evidence and intimate familiarity with the facilities at issue, the district court reached the conclusion –"a conclusion that should be apparent to anyone who has visited Fernald" (App. 39) –that a transfer could be "devastating" for the individuals still residing at Fernald.

Given this documented evidence of subtle and not-so-subtle intimidation, the district court recognized that the residents and guardians were effectively being disenfranchised in the ISP process, and that this problem was systemic as it permeated the ISP process for all of the Fernald residents. (App. 39-40.)

Consequently, on August 14, 2007, the district court entered an order that was narrow, circumscribed, and judicious, one that focused specifically upon the communications between the Commonwealth and guardians and residents:

> Any further communication from Defendant Commonwealth of Massachusetts Department of Mental Retardation to Fernald residents and their guardians which solicits choices for further residential placement shall include Fernald among the options which residents and guardians may rank when expressing their preferences.

(the "2007 Order," App. 42.) The Commonwealth and First Circuit suggest that this order required Fernald and other institutions to remain open in perpetuity, but this suggestion is flatly contradicted

by the district court's order itself: "The purpose of today's order is not to interfere with closure, but to make sure alternative placement decisions properly start with the needs and wishes of the individual resident, rather than an inflexible global closure policy." (App. 43-44, n.17.) Far from requiring the Commonwealth to open or close any particular facility, the 2007 Order simply required DMR to allow individuals and guardians to express their preference to remain at Fernald. At the conclusion of the ISP process, it might ultimately be determined that another setting could provide "equal or better services," but at least those discussions would not begin with foregone conclusions and pre-judgments that were made without true consideration of the individuals' needs.

C. The First Circuit Showed No Deference To The District Court's Decades Of Experience Or Factual Findings.

On October 1, 2008, the First Circuit reversed the 2007 Order and dismissed the case for lack of jurisdiction.[3] After emphasizing the sound budgetary reasons for closing Fernald, the appeals court's decision treats the proceedings in the district court as simply a question of contract interpretation:

> The terms of the consent decree embodied in the Disengagement Order, like any contract construction issue,

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[3] The First Circuit entered an Amended Judgment on November 18, 2008 to clarify that the 1993 Disengagement Order remains in full force and effect. (App. 80-81.)

> present an issue of law that we review de novo. See generally F.A.C., Inc. v. Cooperativa de Seguros de Vida de P.R., 449 F.3d 185, 192 (1st Cir. 2006). Our view of the proper construction is different from the district court's.

(App. 21) The appeals court paid no heed to the extensive factual findings by the Monitor and the district court; although it praised the district court for its three decades of administering the case "conscientiously and with great care," the appeals court showed no deference whatsoever to the court's hands-on experience. It concluded that the DMR was conducting ISP proceedings, and that "this individualized process . . . cannot constitute a 'systemic failure'" (App. 27) – a non sequitur, particularly in view of the Monitor's and district court's express findings that these individualized processes were conducted, systemically, in a way that prevented a truly personalized assessment of residents' needs.

REASONS FOR GRANTING CERTIORARI

Federal appeals courts have divided sharply over the amount of deference to show to a district court that is interpreting or applying its own prior consent decree. Some circuits show no deference, reasoning that the district court's order is essentially a written contract that should be reviewed de novo as a pure question of law. But this approach is based upon a flawed analogy. A private contract is negotiated between two parties, and the court – a stranger to the transaction – must discern the parties' intent from the language that they used to

express it. In the context of a consent decree, and particularly a consent decree entered in a case involving public institutions, the trial court almost inevitably participated in fashioning the decree. As a participant, the court typically has firsthand knowledge and experience of the object and intent of the decree. Moreover, the application of a consent decree often involves more than the mere interpretation of unambiguous terms in the decree, but the application of those terms to a complex factual situation with which the court has developed unique familiarity. Sensitive to these realities, several circuits have correctly determined that the district court's application and interpretation of its prior decree is entitled to some deference.

This case exemplifies these realities and casts in stark relief why at least a modicum of deference to the district court is warranted. The Disengagement Order was not negotiated solely between parties to a private transaction; the court was an active participant and moving force, with its input drawn from decades of experience with the complex institutional problems to be remedied by the decree. The 2007 Order likewise was not merely a construction of plain language, but required the application of the Disengagement Order to facts that were found after comprehensive investigations. The First Circuit's "de novo" review fundamentally mischaracterized the nature of the issue before it and ran roughshod over the thorough and well supported findings made by the Monitor and the district court.

Ultimately, the issue presented by the Petition is profoundly important, because it speaks directly to the role of federal courts in cases of broad

public significance. This particular case affects the rights of thousands of vulnerable class members who are still supposed to be protected by the 1993 Disengagement Order, and thus has attracted enormous public attention. [4] Other cases in which

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[4] *See, e.g.*, Shirley Barnes, *State will Retain a Presence at Center: Closing in 2013 Worries Town*, Worcester Telegram & Gazette, Jan. 28, 2009, at B3; Nancy Gonter, *Kin of Disabled Start New Fight*, The Republican (Springfield, MA), Jan. 11, 2009, at A1; Brian Benson, *Scramble to Protect State Sites: Fernald, Glavin are Slated to Close*, Boston Globe, Jan. 1, 2009, at T1; Richard Conn, *Governor: Fernald Center to Close its Doors by 2010*, Daily News Tribune, Dec. 14, 2008; Matt Viser, *State will Shutter Fernald, 3 Others*, Boston Globe, Dec. 13, 2008, at B1; John R. Ellement, *Ruling Restarts Fernald Closure: Critics Vow Battle to Keep it Open*, Boston Globe, Oct. 2, 2008, at B2; Richard Conn, *State Files Fernald Appeal*, Daily News Tribune, March 20, 2008; Adrian Walker, Op-Ed, *Do Nothing is a Better Fix*, Boston Globe, Feb. 29, 2008, at B1; Adrian Walker, Op-Ed, *Fernald's Future*, Boston Globe, Sept. 25, 2007, at B1; Eric Moskowitz, *Families Challenge Fernald Plan, Concern Voiced for Mentally Retarded*, Boston Globe, Sept. 25, 2007, at B2; Nicole Haley, *Guardians Stand Fast on Fernald*, Daily News Tribune, Sept. 23, 2007; Editorial, *Don't Appeal Fernald Ruling*, Boston Globe, Sept. 20, 2007, at A10; Shelley Murphy, *State to Appeal Fernald Ruling*, Boston Globe, Sept. 13, 2007, at B3; Glen Johnson, *Patrick Pushes to Close Health Facility*, The Republican (Springfield, MA), Sept. 13, 2007, at B6; Nicole Haley, *Candidates Mull Future of Fernald*, Daily News Tribune, Sept. 13, 2007; Editorial, *Fernald Preserved, but at a Premium*, Boston Herald, Aug. 16, 2007, at 28; Editorial, *The Folly of Closing Fernald*, June 6, 2007, Boston Globe, at A14; Jack Meyers, *Fernald Families Rip Plan to Close Facility*, Boston Herald, Feb. 28, 2005, at 8; Franci Richardson, *Fernald Families Ask Judge to Intervene*, Boston Herald, July 15, 2004, at 27; *see also Hearing Held Over Transfer of Patient from Fernald Developmental Center*, Feb. 26, 2008 New England Cable News video available at http://www.necn.com/Boston/New-England/Hearing-held-over-transfer-of-patient-from-Fernald/1204065197.html (reporting on dispute related to resident transferred against her will);

the issue arises present different factual circumstances, but virtually all involve the use of a consent decree as a tool to vindicate public rights and to effectuate institutional reform.

I. This Court's Guidance Is Important Because The Issue Presented By The Petition Arises Frequently In A Broad Range Of Cases Where Federal Courts Are Overseeing State And Public Institutions.

As the First Circuit itself has acknowledged, "[d]ifferent types of consent decrees are ordinarily conceived and hatched in markedly different ways." *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1338 (1st Cir. 1990). While some consent decrees are simply "born by agreement of the parties and only [affect] their rights and liabilities," others can "reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions." *Heath v. DeCourcy*, 888 F.2d 1105, 1109 (6th Cir. 1989). While the principal cases representing the Circuit split

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Battle Over Mental Health Center Goes to Court, Sept. 4, 2008 New England Cable News video available at http://www.necn.com/Boston/Health/Battle-over-mental-health-center-goes-to-court/1220479668.html (reporting on First Circuit hearing); *Fight for Fernald Goes to Supreme Court*, Feb. 3, 2009 New England Cable News video available at http://www.necn.com/Boston/New-England/2009/02/03/Fight-for-Fernald-goes-to-the/1233701402.html (reporting on Petition for Writ of Certiorari); *Fate of Waltham School for Mentally Retarded Up in Air*, March 7, 2007 WBZ-TV video available at http://wbztv.com/video/?id=29455@wbz.dayport.com (reporting on US Attorney's investigation).

presented here cut across a wide swath of factual and legal contexts, many of them share a common thread in that they involve consent decrees that affect the rights of many more than just the parties involved. Thus, the split impacts important rights across a broad legal spectrum, and the importance of resolving the split is much more than an academic question of appellate review. Rather, it is essential to the consistent administration of justice across this country.

Circuit court decisions involving consent decrees thoroughly illustrate this point. In *David C. v. Leavitt*, 242 F.3d 1206 (10th Cir. 2001), the appeals court applied a de novo review to a district court's application of a prior consent decree entered to remedy federal constitutional and statutory violations in Utah's administration of its child welfare system. *Id.* at 1207. The consent decree at issue set forth ninety-three substantive provisions with which the State was required to comply, including "obligations to investigate reports of child abuse or neglect within specific deadlines; provide placement support services for foster parents; and ensure that foster children attend school and receive medical and dental treatment." *Id.* at 1208. Similarly, in *Thompson v. U.S. Dep't of Housing and Urban Dev.*, 404 F.3d 821 (4th Cir. 2005), a class of African-American public housing residents suffering from racial segregation and discrimination in the Baltimore public housing system entered into a consent decree with the United States Department of Housing and Urban Development and several local officials to make available nearly one thousand desegregated housing units. When, nearly seven years after the entry of the consent decree, the defendants had only managed to supply eight of the

required units, the district court entered an order extending its oversight of the desegregation plan. *Id.* at 825. The Fourth Circuit affirmed, stressing the importance of giving deference to the district court in the public law context. *Id.* at 834.

In addition to these examples, the significant and varying factual contexts in which appeals courts have reviewed a district court's administration of a consent decree include cases involving: the rights of the mentally retarded (*Gates v. Gomez*, 60 F.3d 525 (9th Cir. 1995); *Navarro-Ayala v. Hernandez*-Colon, 951 F.2d 1325 (1st Cir. 1990); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 969 (2d Cir. 1983)); recipients of unemployment insurance benefits (*Barcia v. Sitkin*, 367 F.3d 97 (2d Cir. 2004)); prison reform (*Rufo v. Inmates of Suffolk County Jail*, 502 US 367, 381 (1992); *Alberti v. Klevenhagen*, 46 F.3d 1347 (5th Cir. 1995); *Heath v. DeCourcy*, 888 F.2d 1105 (6th Cir. 1989)); environmental protection actions (*United States v. Alshabkhoun*, 277 F.3d 930 (7th Cir. 2002); *United States v. Knote*, 29 F.3d 1297 (8th Cir. 1994)); gaming rights for Indian tribes (*Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367 (6th Cir. 1998)); anti-trust litigation (*United States v. Broadcast Music, Inc.*, 275 F.3d 168 (2d Cir. 2000)); and civil rights and employment discrimination (*Reynolds v. McInnes*, 338 F.3d 1201 (11th Cir. 2003) (employment discrimination); *Labor/Community Strategy Center v. Los Angeles County Metropolitan Transit Authority*, 263 F.3d 1041 (9th Cir. 2001) (racial discrimination); *Huguley v. General Motors Corp.*, 52 F.3d 1364 (6th Cir. 1995) (employment discrimination)).

The issue presented by the Petition, simply put, affects cases of broad public importance, usually involving the delicate relationship between federal judges and state institutions, and where federal courts are making decisions regarding the rights and lives of countless individuals. Given this context, guidance from this Court is essential to ensure clarity and uniformity throughout the federal court system.

II. Because This Court Has Emphasized The Importance Of Showing Deference To A District Court In Modifying Its Own Decree, A Court's Interpretation Or Application Of Its Decree Should Be Shown At Least As Much Deference.

Those circuits that have applied a deferential standard of review to a district court's administration of a consent decree have recognized that decrees governing institutions are different in kind from agreements reached between private parties. *See, e.g., Heath v. DeCourcy*, 888 F.2d 1105, 1109 (6th Cir. 1989) ("consent decrees which regulate institutional conduct are fundamentally different from consent decrees between private parties . . . [because] they affect more than the rights of the immediate litigants").

Indeed, this Court has itself emphasized that a district court is entitled to considerable discretion in modifying a consent decree in a case involving institutional reform. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 381 (1992) (adopting flexible standard for addressing whether district court properly modified consent decree in

institutional reform case). Placing the modification power in the institutional reform context, this Court specifically referred to "[t]he experience of the district and circuit courts in implementing and modifying such decrees []as demonstrat[ing] that a flexible approach [to modification] is often essential to achieving the goals of reform litigation." *Id.* Concurring in *Rufo*, Justice O'Connor stated: "[o]ur deference to the District Court's exercise of its discretion is heightened where, as here, the District Court has effectively been overseeing a large public institution over a long period of time." *Id.* at 394.

Thus, even those circuits that embrace a de novo review of a district court's application and interpretation of a consent decree have recognized this difference in cases involving modification of a consent decree. Every circuit reviews a district court's decision to modify a consent decree under an abuse of discretion standard. *See, e.g., Thompson v. U.S. Dept. Housing & Urban Dev.*, 404 F.3d 821 (4th Cir. 2005) ("We review the district court's decision to modify the Consent Decree for abuse of discretion"); *Joseph A. et al. v. Ingram et al.*, 275 F.3d 1253, 1267 (10th Cir. 2002) (same); *Parton v. White*, 203 F.3d 552, 555-56 (8th Cir. 2000) (discretionary review of Rule 60(b)(5) motion); *Holland v. N.J. Dep't of Corrections*, 246 F.3d 267, 277-78, 282 (3rd Cir. 2000) (rejecting deferential *de novo* review but acknowledging power to modify decree); *Alberti v. Klevenhagen*, 46 F.3d 1347, 1365 (5th Cir. 1995) (court's discretion to modify consent decree extends to *sua sponte* modifications); *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1017 (6th Cir. 1994) ("This court reviews a district court's modification of a consent decree under an abuse of discretion standard."); *Duran v. Elrod*, 760 F.2d 756,

762 (7th Cir. 1985); *see also In re Pearson*, 990 F.2d 653, 658 (1st Cir.1993) (affirming *sua sponte* decision to appoint master to investigate compliance with consent decree based, in part, on court's ability to modify a consent decree).

The First Circuit's own jurisprudence (unacknowledged by the appeals court below) highlights this contextual difference: it suggests a generally applicable "rule of broad discretion in public interest cases." *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1338 (1st Cir. 1990) (discussing prior cases involving deference to district court's discretion). As stated by the First Circuit:

> In public law litigation, courts typically play a proactive role—a role which can have nearly endless permutations.... Frequently, the trial court's adjudicative function blends with its service as an instrument for change. In overseeing broad institutional reform litigation, the district court becomes in many ways more like a manager or policy planner than a judge. Over time, the district court gains an intimate understanding of the workings of an institution and learns what specific changes are needed within that institution in order to achieve the goals of the consent decree.

Id. Nevertheless, the First Circuit applies a de novo standard in reviewing a district court's interpretation and application of a consent decree. *Id.* at 1340.

This intimate understanding gained by the district court is precisely why other circuits give deference to a district court's interpretation of a consent decree. *See Foufas v. Dru*, 319 F.3d 284, 286 (7th Cir. 2003) (acknowledging that while judges are not often the actual authors of the consent decrees they oversee, their presence at the creation of such a decree "may [provide them] insights into the meaning of the decree . . . that are denied to the appellate judges who review the judge's decision."); *Labor/Community Strategy Ctr. v. Los Angeles County Metro. Transit Auth.*, 263 F.3d 1041, 1048 (9th Cir. 2001) ("we must give deference to the district court's interpretation based on the court's extensive oversight of the decree from the commencement of the litigation to the current appeal."); *Gates v. Gomez*, 60 F.3d 525, 530 (9th Cir. 1995) (indicating deference appropriate where case had been under supervision of same district judge since inception); *Huguley v. General Motors Corp.*, 52 F.3d 1364, 1370 (6th Cir. 1995) (giving weight to district court's interpretation "in light of its experience of dealing with this class action for a period of more than ten years."); *Brown v. Neeb*, 644 F.2d 551, 558 n. 12 (6th Cir.1981) ("[f]ew persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it.").

Given this Court's guidance in *Rufo* and the instruction that lower courts may consider "the circumstances surrounding the formation of the consent order" when interpreting a consent decree, *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975), it is simply common sense that "[i]f those circumstances are known to the judge at first hand, his interpretation comes to the reviewing

court with added weight." *Foufas*, 319 F.3d at 286. It makes no sense that a different, less deferential standard of review should apply to the application and interpretation of a consent decree than its modification; if anything, a district court's order interpreting and applying an existing consent decree should be entitled to ***greater*** deference than an order modifying it – particularly in the public law context where "the consent decree provides for a complex ongoing regime of performance rather than a simple, one-shot, one-way transfer . . . [and] prolongs and deepens, rather than terminates, the court's involvement with the dispute." *Navarro-Ayala*, 951 F.2d at 1338.

This case presents an excellent example of the deep experience that district courts acquire in institutional reform cases, and it highlights the reasons why this Court should resolve the circuit split in favor of a deferential standard. First, the case concerns constitutional violations and remedies in a complex institutional setting, a factor that the First and Fourth Circuits have weighed in favor of deference. *See F.A.C., Inc. v. Cooperativa de Seguros de Vida de Puerto Rico*, 449 F.3d 185, 192 (1ST Cir. 2006) (citing *Navarro-Ayala*, 951 F.2d at 1337-38); *Thompson*, 404 F.3d at 827 (4th Cir. 2005). In addition, the district court in this case has been presiding over this case from its inception more than thirty-five years ago and has entered and overseen interim and final consent decrees. The Sixth, Seventh, Eighth and Ninth Circuits have found that this factor weighs in favor of deference. *See Foufas v. Dru*, 319 F.3d at 286 (7th Cir. 2003); *Gates v. Gomez*, 60 F.3d at 530 (9th Cir. 1995); *Huguley v. General Motors Corp.*, 52 F.3d at 1370 (6th Cir. 1995);

United States v. Knote, 29 F.3d at 1300 (8th Cir. 1994).

Indeed, the district court here has already grappled, successfully, with the very issue that led to the reopening of the case. In 1991, the Commonwealth announced that the Paul A. Dever State School ("Dever") would be closed within three years. *Ricci v. Okin*, 781 F. Supp. 826, 827 (D. Mass. 1992). That announcement aggravated existing deficiencies in the delivery of services to Class Members residing at Dever, by leading to increased employee absenteeism, the loss of significant staff members and leadership, and an overall reduction in the quality of services delivered to the Dever residents. *Id.* Taken together, the problems at Dever were so serious that the facility faced the threat of losing its federal funding and Medicaid certification if the situation did not improve. *Id.*

The district court did not prevent the eventual closing of Dever, but recognized that it must "once again clarify the defendants' obligations to Class Members in proceeding with development of plans for implementing the Governor's various proposals to consolidate facilities for the mentally retarded." *Ricci*, 781 F. Supp. at 827. The court identified the overarching principle that has applied consistently throughout this long litigation: it is DMR's duty to "assess the needs of [Class Members] on an individual, as opposed to wholesale, basis." (App. 39.) Thus, the court required that "[i]n order to close Dever, or any other Consent Decree facility, the defendants must assure this court that they will meet each Class Member's needs, as specified in his or her ISP." *Ricci*, 781 F. Supp. at 828. Accordingly, "[r]ecommendation as to . . . placement [must be]

based on evaluation of the actual needs of the resident or client rather than on what facilities and programs are currently available." *Id.* at 827 n.4. The court specifically required "[a]ppropriate mechanisms . . . to provide Class Members and their families with due process rights regarding all ISP decisions, including transfer decisions." *Id.* at 830.

An appellate court simply is not in a position to understand these complex cases as deeply and broadly as the district courts that have immersed themselves in them for years. In view of these realities, this Court should resolve the conflict between the circuits and re-emphasize the importance of showing deference to the district court.

III. The First Circuit Reviewed The 2007 Order "De Novo," Even Though The Order Was Necessarily Predicated On Factual Findings.

In this case, the district court's 2007 Order was entitled to even greater deference, not just because of the court's unique experience and perspective, but because it rested upon explicit factual findings. Those findings were based upon an independent investigation by the U.S. Attorney's office and upon the district court's decades of familiarity with the complex institutions under review.

In reviewing the 2007 Order, the First Circuit simply substituted its own judgment for that of the district court. Treating the issue before it as an abstract question of law, the First Circuit purported

to interpret the provisions of the Disengagement Order. But the district court's 2007 Order reopening the case was expressly predicated upon factual findings that the "DMR failed to discharge its ISP duties" (App. 23), among others. These findings were well-grounded in an extensive record: the comprehensive investigation conducted by the United States Attorney, the evidence of coercion and intimidation presented to the court, and the district court's decades of experience and intimate familiarity with the state institutions and vulnerable population before it. *See, e.g., Ruiz v. Lynaugh*, 811 F.2d 856, 861 (5th Cir. 1987) (district court "has the personal knowledge, experience, and insight necessary to evaluate the parties' intentions, performances and capabilities."). Most disturbingly, the First Circuit – despite the evidence in the record – simply rejected the possibility of any such intimidation. (App. 28 n.9.) This was error. *See, e.g., Amadeo v. Zant*, 486 U.S. 214, 228 (1988) (there "is no excuse for the Court of Appeals to ignore the dictates of Rule 52(a) and engage in impermissible appellate factfinding.").

The district court's factual findings should have been reviewed deferentially, for clear error. *See* Fed. R. Civ. P. 52(a); *see, e.g., Anderson v. City of Bessemer, North Carolina*, 470 U.S. 564, 574-75 (1985) ("The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise."). This standard is fully applicable in the context of a consent decree. *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982) (Rule 52(a) "does not make exceptions or

purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. . . . [and] whether the differential impact of the seniority system reflected an intent to discriminate on account of race" is a pure question of fact).

The First Circuit's failure to apply the appropriate standard of review to the facts found by the trial court was error, one that creates another conflict among the circuits. *See Kendrick v. Bland*, 931 F.2d 421, 423-24 (6th Cir. 1991) (district court's factual findings that consent decree was violated are reviewed for clear error); *see also Labor/Community Strategy Ctr. v. Los Angeles Metro. Transit Auth.*, 263 F.3d 1041, 1048 (9th Cir. 2001) ("This court reviews de novo the district court's interpretation of the consent decree, but must defer to the district court's factual findings underlying the interpretation unless they are clearly erroneous.").

CONCLUSION

For more than three decades, the district court has carefully, conscientiously, and effectively administered its decrees regulating the DMR. Over that extended period, the district court gained unique insight and unmatched experience in the complex dynamics between the Commonwealth's administrative institutions and the mentally retarded residents who lived in state facilities. Drawing upon that insight and experience and an extensive factual record, the district court found systemic violations of its 1993 Disengagement Order.

As a remedy, the court entered a carefully limited order that targeted the identified violations.

In reviewing the district court's order, the First Circuit applied the wrong standards, failing to show the level of deference to the district court that this Court's precedents require. The First Circuit's decision deepens a split between the circuits on a matter of significant importance throughout the federal judiciary. Accordingly, this Court should grant the Petition, issue a writ of certiorari to the First Circuit, and vacate and reverse the First Circuit's decision.

Respectfully submitted,

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